Filed 9/6/17 P. v. Pitcher CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DARIN ALEXANDER PITCHER, Defendant and Appellant.	A144718 (Contra Costa County Super. Ct. No. 051213834)

Appellant Darin Alexander Pitcher sexually assaulted his sister over a several-month period when he was 17 years old. He appeals from a judgment sentencing him to prison for 21 years after a jury convicted him of two counts of sexual battery by restraint (Pen. Code, §§ 243.4, subd. (a))[1], five counts of forcible sexual penetration (§ 289, subd. (a)(1)(A)), one count of forcible rape (§ 261, subd. (a)(2)) and one count of forcible oral copulation (§ 288a, subd. (c)(2)(A)). Appellant contends: (1) the trial court should have excluded evidence of incriminating statements he made to a police officer who delayed in giving him warnings required by *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); (2) the trial court erroneously removed a juror for failing to deliberate; (3) the case must be remanded for a "fitness" hearing before a juvenile court judge pursuant to The Public Safety and Rehabilitation Act of 2016 (Proposition 57), which was enacted while this appeal was pending; and (4) the trial court erroneously believed full strength consecutive

[1] Further statutory references are to the Penal Code unless otherwise indicated.

sentences were required under section 667.6, subdivision (d). We agree the case must be remanded for a fitness hearing under Proposition 57, but otherwise affirm.

BACKGROUND

Over an eight-month period beginning in October 2011, appellant sexually assaulted his sister, Jane Doe, on several occasions. Appellant was 17 years old and Jane was 14 and 15 at the time of these acts. Appellant, who was significantly bigger and stronger than Jane, would enter her bedroom, remove her underwear and – against her explicit wishes – either digitally penetrate her, have unwanted sexual intercourse with her, or orally copulate her.

The incidents occurred while Jane and appellant were home alone. Jane was scared of appellant, who had hit her in the past. At some point, she stopped putting up physical resistance and only objected verbally. Appellant surreptitiously took nude photographs and a video of Jane, which he used to blackmail her. He later deleted the video and the intercourse stopped, but the penetration and oral copulation continued.

The abuse came to light on May 30, 2012, when Jane told her friend Gabriel R. that appellant had been touching her inappropriately. Gabriel told his sister Taylor, who was Jane's best friend at the time, and Taylor confirmed this with Jane. Later that same evening, appellant and Jane picked up Gabriel and Taylor to drive them to choir practice at their church. Taylor confronted appellant about the abuse and appellant acknowledged it was true but claimed he had stopped. Taylor called 911.

Pittsburg Police Officer Mike Keefe drove to the church in response to a report of "child abuse." After being briefed at the scene that appellant had inappropriately touched his sister, Keefe transferred appellant to the back of his patrol car and spoke with him for approximately five minutes, during which time appellant admitted having forcible sex with Jane Doe on between 20 and 30 occasions. Keefe terminated the interview and transported appellant to the police station, where appellant was advised of his *Miranda* rights and gave a lengthy interview in which he detailed an eight-month period of forcible sexual assaults against Jane. Appellant admitted acts that included sexual penetration, sexual intercourse, and oral copulation.

Officer Keefe conducted a brief, unrecorded, interview with Jane and her mother. Jane confirmed appellant had been forcing himself on her sexually for eight months. She said the assaults occurred in her bedroom at least once a week while she was home alone during the day, with the last incident having occured approximately two weeks earlier.[2]

The district attorney filed an information charging appellant with 20 felony counts: two counts of sexual battery by restraint (counts 1 and 2; § 243.4, subd. (a)), five counts of forcible sexual penetration (counts 3-7; § 289, subd. (a)(1)(A)), ten counts of forcible rape (counts 8-17; § 261, subd. (a)(2)), two counts of forcible oral copulation (counts 18 and 19; § 288a, subd. (c)(2)(A)), and one count of attempted forcible oral copulation (count 20; §§ 664/288a, subd. (c)(2)(A)). The jury found appellant guilty of the two counts of sexual battery by restraint (counts 1 and 2), the five counts of forcible sexual penetration (counts 3-7), one count of forcible rape (count 8) and one count of forcible oral copulation (count 18). It hung on the remaining ten counts.

The court denied appellant's motion for new trial and sentenced him to prison. It imposed consecutive three-year lower terms on each of the sexual penetration, rape and oral copulation counts, ordering those sentences to run at full strength under section 667.6, subdivision (d), due to the crimes having been committed on separate occasions. Concurrent terms of 16 months each were imposed on the sexual battery counts. Appellant's aggregate sentence was 21 years.

DISCUSSION

I.

Effect of Initial Interview Without Miranda *Advisements*

Appellant argues the trial court erred when it denied his pretrial motion to suppress his statements to police on the ground he should have been advised of his

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[2] Jane was a reluctant witness at trial and refused to testify until the trial court explained she could be held in contempt if she failed to do so. When she did testify, she recanted many aspects of her earlier statement, particularly with respect to the forcible nature of appellant's conduct. Jane's mother testified for the defense and denied Jane had made most of the statements described by Officer Keefe.

Miranda rights when he first spoke to Officer Keefe in the back of the patrol car. We disagree.

a. Background

The evidence introduced during the hearing on the motion to suppress was as follows:

On May 30, 2012, Contra Costa sheriff's deputies responded to a call at the First Pentecostal Church and found appellant, Jane Doe, their parents and some friends in the parking lot. Jane spoke with a deputy inside a patrol car and told him appellant had been molesting her in the family home, which was located within the city of Pittsburg. Appellant was placed in the back of a Sheriff's Department patrol car to await the arrival of Pittsburg Police Department officers, but he was not handcuffed.

Pittsburg Police Department Officer Mike Keefe arrived at the scene, where he spoke with Sergeant Daniels of the Sheriff's Department and learned appellant was suspected of "inappropriate touching." Keefe moved appellant to the inside of his own patrol vehicle and closed the door and told him he was not under arrest. After speaking briefly with appellant's parents, Keefe returned to the patrol car where he opened the door and knelt down to appellant's seated level to speak with him. Appellant's legs were outside of the car. Keefe reiterated that appellant was not under arrest and asked appellant if he knew why police had been called. Appellant responded that one of Jane's friends had called the police to report that appellant was touching Jane inappropriately. Keefe thought maybe they had been experimenting with sexuality being that they were both young, and appellant said no, he had been touching his sister underneath her underwear on her vagina and rubbing her breasts. When asked "Is that it?" appellant responded that they had been having sexual intercourse as well. O'Keefe asked appellant how many times that had happened and appellant said 20 to 30 times.

After hearing this, Officer Keefe decided the interview should be continued at the police station. He asked appellant to put his legs back inside the car and shut the door without placing appellant in handcuffs. At Keefe's request, appellant's parents followed

them to the station. Keefe estimated 20 or 25 minutes had elapsed between his arrival at the church parking lot and his departure with appellant.

Once at the station, Officer Keefe placed appellant in an interview room. He offered appellant's parents the opportunity to be present while he conducted the interview, but neither elected to do so. Appellant's father left the building, disgusted, and the mother chose to stay with Jane. Keefe briefly spoke with Jane, and then returned to the interview room. Although he told appellant he was not under arrest, Keefe read appellant his *Miranda* rights. Appellant then voluntarily disclosed numerous lewd touchings as well as acts of forcible rape, penetration, and oral copulation.

The trial court denied the motion to suppress appellant's statements, concluding the conversation with Officer Keefe inside the patrol car was not a custodial interrogation within the meaning of *Miranda*. The court additionally found that even assuming the statement in the patrol car was custodial in nature, it was voluntarily given and did not taint the subsequent statement at the police station, which was preceded by adequate *Miranda* warnings.

b. Standard of Review

In reviewing appellant's *Miranda* claim, ". . .we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained." (*People v. Cunningham* (2001) 25 Cal.4th 926, 992; see also *People v. Thomas* (2011) 51 Cal.4th 449, 476.)

c. Analysis

Miranda establishes that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda, supra,* 384 U.S. at p. 444.)

In *Oregon v. Elstad* (1985) 470 U.S. 298, 318 (*Elstad*), the United States Supreme Court held that a suspect who responds to "unwarned yet uncoercive questioning" in a custodial setting may later waive his rights and confess after being given a proper *Miranda* warning. In other words, when "a prior custodial statement, though obtained without *Miranda* warnings, was otherwise uncoerced, any taint upon a second statement is dissipated by a determination that the second statement was itself voluntary and obtained without a *Miranda* violation." (*People v. Storm* (2002) 28 Cal.4th 1007, 1030.) "Moreover, a later statement obtained in compliance with *Miranda*, and without coercive methods of interrogation, is not to be presumed involuntary simply because the suspect has already incriminated himself. ' "[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. . . . But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." ' " (*Ibid*., citing *Elstad*, at p. 311.)

Even if we assume appellant was in custody when he first spoke to Officer Keefe in the patrol car, appellant has made no claim that his initial statement was coerced or otherwise involuntary. Defense counsel conceded below that appellant was adequately advised of his *Miranda* rights before he made his second statement at the police station, which was far more detailed and incriminating. Because this second statement was plainly admissible under *Elstad*, *supra*, 470 U.S. at page 318, any error in allowing evidence of the first statement to Officer Keefe was harmless beyond any reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1410.)

Appellant argues his statements should be excluded under *Missouri v. Seibert* (2004) 542 U.S. 600, 617, 622, in which the United States Supreme Court held unconstitutional a two-step police protocol that utilized successive interrogations to produce unwarned confessions, which were then reaffirmed after *Miranda* warnings. We are not persuaded.

As explained in *People v. Camino* (2010) 188 Cal.App.4th 1359, 1368, the plurality holding of *Siebert* applies only to cases in which the police acted *deliberately* to withhold warnings until after a suspect confesses. The trial court expressly found there was no such deliberate process in this case, a factual determination to which we defer. (*Id*. at pp. 1372, 1376.) Officer Keefe testified that when he first spoke to appellant, it was not even clear to him that a crime had been committed. When appellant admitted serious sexual contact with his sister, Keefe promptly terminated the interview and transported appellant to the police station where he was *Mirandized* before any additional questioning took place. The evidence in this case did not support an inference that Keefe decided to delay giving appellant a *Miranda* warning as part of any deliberate strategy, and substantial evidence supported the trial court's determination to that effect.

II.

Removal of Juror For Failure to Deliberate

Appellant seeks reversal of his convictions of forcible rape and forcible oral copulation under counts 8 and 18 on the ground that those counts were rendered after the court had improperly removed a juror based on her purported failure to deliberate. We reject the claim.

a. Background

The jury retired for deliberations shortly before 4:00 p.m. on Monday, December 8, 2014, and continued to deliberate on Tuesday, December 9 and into the following morning. At 2:25 p.m. on Wednesday, December 10, the foreperson sent the court a jury note stating the jury had reached a verdict on counts 1-7 and were hung on the remaining counts. The court conferred with counsel and brought the jury into the courtroom where it accepted the verdicts reached thus far. Having instructed the jurors not to reveal their numerical division on the remaining counts or "which way the vote is going," the court instructed the jurors to continue deliberating with the goal of reaching "a fair and impartial verdict, if you are able to do so." At 4:30 p.m., just before adjourning for the evening, the jury sent another note stating, "When coming back into the jury deliberation room, some people specifically said '[t]here's nothing you can say

or show me that will change my mind.' What do we do then?" The court sent a note the following morning urging them to continue their deliberations in light of the instructions given.

At 1:50 p.m. on Thursday, December 11, the jury sent a note to the court stating, "There is a juror, # 2, who is completely, and admittedly, disengaged. Can she be removed for an alternate?" The court conferred with counsel and framed the issue as whether Juror No. 2 had engaged in deliberations for a reasonable period of time after the verdicts were returned on counts 1 through 7.

The court questioned the foreperson (Juror No. 12) outside the presence of the other jurors, and he indicated that Juror No. 2 had stopped deliberating no later than mid-day on Tuesday. He advised the court that Juror No. 2's reluctance to engage was so apparent that it was "actually brought up in the jury room." When asked to confirm that Juror No. 2 had stopped deliberating on mid-day Tuesday, the foreperson said, "I wouldn't even say she participated in meaningful discussion before then."

The court then questioned Juror No. 2 outside the presence of the other jurors and the following exchange occurred: "THE COURT: . . . . [¶] I asked you to come in this afternoon, because as you assume, the foreman has indicate[d] to us that you have disengaged from the process of deliberations. [¶] JUROR NO. 2: That is his opinion. [¶] THE COURT: . . . . [¶] . . . . [¶] . . . . [W]hy don't you tell me what your position is on whether you are willing and able to continue deliberations with the other jurors. [¶] JUROR NO. 2: Yes. [¶] THE COURT: Okay. And do you feel that there has been any point where you have declined to engage in the negotiations – or I should say deliberations. [¶] JUROR NO. 2: I don't even really know what that means. [¶] THE COURT: Well, there's a difference between having a discussion and having disagreement and not being willing to have a discussion. [¶] In other words, you're either shutting down, not communicating, not expressing your views. [¶] JUROR NO. 2: I have expressed my views many times. [¶] THE COURT: Okay. And have you listened to and considered the other jurors' views? [¶] JUROR NO. 2: Yes, I have."

In light of the "rather divergent perspectives" between the foreperson and Juror

No. 2, and with the agreement of both counsel, the court questioned the other jurors individually. Juror No. 1 stated that Juror No. 2 had stopped deliberating immediately after they had "finalized" the verdicts on the first seven counts on Wednesday morning.[3] Her expressions of her point of view had not seemed of the "deliberating kind," or "open to discussion" and she would say things like, "I feel like I'm repeating myself, so I don't see why I should engage more."

Juror No. 3 did not think it appeared that Juror No. 2 was "fully disengaged," but it seemed like "maybe she's not focusing." She had shared her views with the other jurors that morning (Thursday) but had stated the jury was going over the same ground and "she feels like she's heard this before and doesn't need to pay attention again."

Juror No. 4 noted that Juror No. 2 seemed disengaged "[p]retty much all day yesterday [Wednesday] and today [Thursday] she is refusing to engage in the conversation at all." Juror No. 2 had been looking down most of the time when the rest of the jury was talking and when the reporter was doing readbacks of the testimony. When another juror commented on Juror No. 2 doing crossword puzzles, Juror No. 2 admitted as much and said it was because she had "already heard this and this is just repeated information."

Juror No. 5 similarly told the court that Juror No. 2 became disengaged some time on Tuesday and had stopped expressing her views on Wednesday, after saying she was repeating herself and there was no point to keep talking about it. Juror No. 5 believed Juror No. 2 seemed "very defensive" and she had been doing crossword puzzles rather than discussing the evidence: "She said she is not going to be convinced of anything and she's already made up her mind."

Juror No. 6 similarly believed Juror No. 2 was "disengaged from the process" because she had been doing crossword puzzles while the rest of the jury was reviewing

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[3] Although the jurors did not advise the court they had reached a partial verdict until 2:55 p.m. on Wednesday, December 10, it appears they took an initial vote on those counts on Tuesday, December 9 and took a final vote on those counts on Wednesday morning.

the evidence or listening to the court reporter read back requested testimony. Though Juror No. 2 had been involved in the discussion on Monday afternoon when the jury first received the case, she was disengaged by Tuesday afternoon "and all day yesterday [Wednesday] and today [Thursday]." While she had made the "occasional comment" and might have made "one or two comments" that day (Thursday)," Juror No. 2 "for the most part wouldn't get involved in discussions and didn't appear to want to be involved in the discussion."

Juror No. 7 indicated that Juror No. 2 had not said very much, but "it might be the way she processes things, taking a step back." She had expressed her views in the case as late as that morning (Thursday) and had also done so "a couple of times yesterday, maybe like one time yesterday (Wednesday)." When she wasn't talking, she was "looking down and she could be doodling, but I . . . can't see what she is doing exactly."

Juror No. 8 was one of the jurors who originally prompted the investigation, noting Juror No. 2 had been doing crossword puzzles "at least from Tuesday on" and told the other jurors after the readback that "there is nothing we can tell her to change her mind. There is no additional evidence we can show her to change her mind, she stated that." When Juror No. 8 requested that Juror No. 2 and other jurors give the court reporter 100 percent of their attention during a readback, Juror No. 2 "was combative and said that she thought that was unreasonable and I was being childish in asking for it, and specifically said that she chooses to do her word puzzle when she feels that we are having conversation that is repetitive and she doesn't need to be involved in it."

Juror No. 9 was also one of the jurors who prompted the investigation, complaining that Juror No. 2 had been disengaged and doing crossword puzzles "pretty much since we've been deliberating." She had expressed her views "[v]aguely" and "did mention, when I brought it up, that she does disengage herself from the conversation." The last time Juror No. 2 had described her view of the case was "maybe yesterday [Wednesday]."

Juror No. 10 observed that Juror No. 2 was "distracted," "doing other things," and "[w]ithdrawing from conversations and not taking part." She had become disengaged

after the jury had delivered the partial verdicts on Wednesday afternoon, but had made a statement regarding her views "first thing this morning [Thursday]."

Juror No. 11, in contrast, believed Juror No. 2 was "absolutely" engaging in deliberations, but not "all the time." Juror No. 2 had described her opinion of the case to the rest of the group and had most recently done so that morning.

After hearing the responses from the jurors, the district attorney asked the court to excuse Juror No. 2 based on her failure to deliberate in a meaningful fashion. Defense counsel disagreed Juror No. 2 should be excused, arguing she had participated in the deliberations sufficiently to join in the guilty verdicts on counts 1 through 7 and that her disengagement was a product of having already heard the material being discussed. Counsel noted Juror No. 2 had expressed her views as recently as that morning.

The trial court granted the district attorney's request to excuse Juror No. 2. It indicated the question was whether the juror was refusing to deliberate versus having a difference of opinion as to the merits of the case, and noted a "very strong majority" of jurors had stated that Juror No. 2 had disengaged starting Tuesday morning.

It appeared to the court the jury had tentatively reached its partial verdict on Tuesday and had finalized it on Wednesday. Based on the various comments of her fellow jurors, the court inferred that Juror No. 2 "did begin to stop full deliberations Tuesday morning when she was starting, spending more time – spending time working on crossword puzzles rather than engaging in the deliberative process. She did participate in the verdicts on Counts 1 through 7. As to the remaining counts she stopped deliberating. And by deliberating, I mean not just expressing her own views, but listening to and considering the views of the other jurors, which is half the process. [¶] She clearly was willing to state her views as recently as this morning, but I don't believe that she has listened to or considered the views of the remaining jurors since sometime Tuesday on the remaining counts."

In ruling on appellant's motion for new trial, which was based on part on the court's order excusing Juror No. 2, the court stated the following: "I did make the comment that the majority of the jurors placed that timeframe [for Juror No. 2's

disengagement from deliberations] at Tuesday. What I meant by that is that five of the jurors in my view placed her as stopping to deliberate on Tuesday, which was really the first full day of deliberations."[4] The court also observed: "I did not find Juror Two's testimony to be credible at all because she did not acknowledge any disengagement or refusal to deliberate where I think everyone except one other juror were consistent in believing that she had disengaged."

b. General Principles and Standard of Review

Section 1089 provides, in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform [her] duty, or if a juror requests a discharge and good cause appears therefor, the court may order [her] to be discharged and draw the name of an alternate, who shall then take [her] place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." (See also Code Civ. Proc., §§ 233, 234.) This statute allows the court to remove a juror who refuses to deliberate, "on the theory that such a juror is 'unable to perform [her] duty' within the meaning of [] section 1089." (*People v. Cleveland* (2001) 25 Cal.4th 466, 475 (*Cleveland*).) "Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury." (*Id.* at p. 485.)

When deciding whether to excuse a juror for failing to deliberate, the trial court must make an appropriate inquiry in order to have "the requisite facts upon which to decide whether [the removed juror had] in fact failed to carry out her duty as a juror to deliberate or whether the jury's inability to reach a verdict was due, instead, simply to

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[4] Juror Nos. 5, 6, 8, 9 and 12 (the last one being the foreperson) specifically stated that Juror No. 2 had become disengaged sometime on Tuesday. Jurors 1, 4 and 10 believed she had disengaged sometime on Wednesday, the date the partial verdict was returned.

[the removed juror's] legitimate disagreement with the other jurors." (*People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066 (*Castorena*).) The court is not required to take a juror's verbal declarations at face value when they conflict with her behavior and demeanor. (See *People v. Lucas* (1995) 12 Cal. 4th 415, 489; *People v. Diaz* (2002) 95 Cal.App.4th 695, 699–705.)

The trial court's determination of good cause under section 1089 is subject to review for abuse of discretion, but the inability of the juror to perform "his or her duty 'must appear in the record as a demonstrable reality.' [Citations.]" (*People v. Armstrong* (2016) 1 Cal.5th 432, 450.) This standard, which is more stringent than the deferential substantial evidence test, "requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion [that good cause] was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052–1053 (*Barnwell*).)

c. Analysis

The trial court in this case determined, as a factual matter, that Juror No. 2 had been involved in deliberations until unanimous agreement on the first seven counts had been reached, but had then disengaged in the process. This factual conclusion was supported by the record, because the majority of jurors advised the court that Juror No. 2 had stopped participating in deliberations at a time no later than just after the partial verdict was returned on counts 1 through 7. (See footnote 4, *ante*.) Though Juror No. 2 denied she was disengaged, the trial court did not believe her. "[W]e afford deference to the trial court's factual determinations, based, as they are, on firsthand observations unavailable to us on appeal." (*Barnwell, supra,* 41 Cal.4th at p. 1053.) The "totality of the evidence" supports the trial court's decision to remove Juror No. 2 from the jury. (*Ibid.*)

It is true "[a] juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresse[d] the belief that further discussion will not alter his or her views. [Citation].)" (*Cleveland*, *supra*, 25 Cal.4th at p. 485.) But that is not what happened here. Crediting the factual determinations actually made by the trial court in this case (*Barnwell*, *supra*, 41 Cal.4th at p. 1053), Juror No. 2 did not simply advise the other jurors she had reached the point in deliberations where further discussion would not be of assistance. Rather, she withdrew from the discussions and shifted her attention to her crossword puzzles, an inherently distracting activity and one that has been held to constitute juror misconduct when engaged in by jurors while evidence is being taken at trial. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 410, 413.)[5] Working a crossword puzzle while the other jurors deliberated put a virtual if not an actual wall between Juror No. 2 and the rest of the jury, and the activity could reasonably have been viewed by the trial court as tantamount to "attempting to separate oneself physically from the remainder of the jury." (*Cleveland*, *supra*, 25 Cal.4th at p. 485; see *Diaz*, *supra*, 95 Cal.App.4th at pp. 699–705 [juror properly removed for failure to deliberate when she did not participate in a discussion of the facts due to her apparent distress over her perception of being attacked by other jurors]; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333 [juror properly removed when, among other things, he did not answer questions posed by other jurors during deliberations, did not sit at the table with them, and acted as though he had already made up his mind].)

This case is distinguishable from *Castorena*, *supra*, 47 Cal.App.4th 1051, in which the trial court was held to have abused its discretion when it dismissed a juror for failing to deliberate. In *Castorena*, the court had received a 15-page document from the accused juror contradicting earlier allegations of misconduct against her and raising new

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[5] This misconduct was deemed harmless in *Hasson*, in which the court considered whether a motion for new trial based on the juror misconduct was properly denied, not whether a juror should have been excused based on evidence that came to light during deliberations. (See *Hasson*, *supra*, 32 Cal.3d at pp. 417–418.)

allegations of juror misconduct against a different juror, yet it had failed to conduct an inquiry on the information contained in the document. (*Id.* at p. 1066.) Here, by contrast, the court made a thorough inquiry of each juror and considered all the available evidence regarding the issue before it.

Also distinguishable is *People v. Bowers* (2001) 87 Cal.App.4th 722, in which the trial court was held to have abused its discretion in discharging a juror based on his inattentiveness and failure to deliberate. (*Id.* at pp. 724, 735.) The juror in *Bowers* had participated in the group discussions and a request for a readback of certain testimony, but did not change his opinion—formulated early on—that a crucial prosecution witness was not believable. (*Id*. at pp. 731–735.) With respect to the juror's claimed inattentiveness, the court observed, "The problem with the deliberations was that the jurors were at [an] impasse, not that Juror No. 4 was inattentive." (*Id*. at p. 731.) And with respect to his purported failure to deliberate, the court emphasized that deliberations do not require a formal discussion. "It cannot be said a juror has refused to deliberate so long as a juror is willing and able to listen to the evidence presented in court, to consider the evidence and the judge's instructions, and to finally come to a conclusion and vote, which is precisely what Juror No. 4 did." (*Id*. at p. 735.) While the juror in *Bowers* remained steadfast in his original assessment of the evidence, he did not distance himself from the deliberations in the same manner as Juror No. 2 in this case.

The trial court did not abuse its discretion in removing Juror No. 2 from the jury based on her failure to deliberate.

III.

Proposition 57

Appellant was 17 years old when he committed the crimes in this case. The prosecutor directly filed the charges against him in adult court, as was permitted under former Welfare and Institutions Code section 707, subdivisions (b) and (d)(1) and (2), rather than filing a wardship petition in juvenile court. On November 8, 2016, while this appeal was pending, California voters enacted Proposition 57, which amended Welfare and Institutions Code sections 602 and 707 to eliminate direct filing by prosecutors.

(Prop. 57, § 4.2.) Under Proposition 57, all charges against juveniles must now be initially filed in juvenile court. (Welf. & Inst. Code, §§ 602, 707, subd. (a).) Though a district attorney may make a motion to transfer certain cases to adult court, the juvenile court is charged with making the decision and may do so only after it holds a hearing to consider such factors as the minor's maturity, degree of criminal sophistication, prior delinquent history, and potential for rehabilitation. (Welf. & Inst. Code, § 707, subd. (a).)

In response to our request for supplemental briefing, appellant argues that Proposition 57's elimination of direct filing is an ameliorative provision that must be retroactively applied to defendants like him, whose cases are not yet final on appeal. He argues that although Proposition 57 is silent on the issue of retroactivity, the voters clearly intended to broaden the number of minors who could stay within the juvenile justice system with its emphasis on rehabilitation over punishment. Appellant also asks us to apply the rule of *In re Estrada* (1965) 63 Cal.2d 740, 744–745 (*Estrada*), under which a statute reducing the penalty for an offense is presumed to apply to cases not yet final. The Attorney General responds that Proposition 57 does not effect a reduction in punishment, and is presumed to apply prospectively only, at least as to cases that have not yet gone to trial. (See Pen. Code, § 3.)

These arguments have been thoroughly analyzed in a series of recent court of appeal decisions, and the issue of Proposition 57's retroactivity is currently pending before our Supreme Court. (See *People v. Cervantes* (2017) 9 Cal.App.5th 569, review granted May 17, 2017, A140464 [Proposition 57 is not retroactive, though as to counts reversed for a retrial, Proposition 57 does apply and requires a fitness hearing to determine where that retrial will be held]; *People v. Mendoza* (2017) 10 Cal.App.5th 327, review granted July 12, 2017, H039705 [Proposition 57 is not retroactive]; *People v. Vela* (2017) 11 Cal.App.5th 68, review granted July 12, 2017, G052282 (*Vela*), [Proposition 57 is retroactive; convictions conditionally reversed and remanded to juvenile court for a fitness hearing]; *People v. Superior Court (Lara)* (2017) 9 Cal.App.5th 753, review granted May 17, 2017, E067296 [where crime was committed before effective date of Proposition 57 but case had not yet been tried, defendant was entitled to fitness hearing to

determine whether case could proceed in adult court; although Proposition 57 is not retroactive, requiring a fitness hearing under these circumstances does not amount to retroactive application of the law because the trial has not yet been held]; *People v. Marquez* (May 16, 2017) 11 Cal.App.5th 816, review granted July 26, 2017, F070609 [Proposition 57 not retroactive]; *People v. Superior Court (Walker)* (2017) 12 Cal.App.5th 687 [Proposition 57 not retroactive]; *People v. Pineda* (Aug. 14, 2017 B267885) __ Cal.App.5th __ [2017 Cal.App.Lexis 706] (*Pineda*) [Proposition 57 is retroactive].)

Though the majority of appellate courts to consider the issue so far have reached a different result, we adopt the reasoning of *Vela*, *supra*, 11 Cal.App.5th 68 and *Pineda*, *supra*, __ Cal.App.5th __ [2017 Cal.App.Lexis 706] and conclude that Proposition 57 applies retroactively to cases pending on appeal. Given that the issue will be resolved by our Supreme Court, we need not elaborate on the reasoning of our colleagues to the south. We note, however, that a retroactive application of Proposition 57 is fully consistent with the relatively recent "sea change in penology regarding the relative culpability and rehabilitation possibilities for juvenile offenders" (*Vela*, at p. 75), as well as with one of the stated purposes of Proposition 57 itself, namely, to "[r]equire a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 2 (5), p. 141.) We are also persuaded that the potential for a juvenile disposition in lieu of a prison sentence, which would almost certainly result in significantly less time in custody for a defendant found to have committed a crime for which direct filing was formerly available, effects a reduction in punishment within the spirit of *Estrada*, *supra*, 63 Cal.2d at p. 744, even if it does not lower the penalty for a particular offense.

Accordingly, the case must be conditionally remanded for a fitness hearing before the juvenile court, at which that court should, "to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had

then moved to transfer [the] cause to a court of criminal jurisdiction." (*Vela, supra*, 11 Cal.App.5th at p. 82.)

IV.

Mandatory Consecutive Sentences under § 667.6 subdivision (d)

Section 667.6, subdivision (d), requires full strength consecutive sentences for enumerated sexual offenses "if the crimes involve separate victims or involve the same victim on separate occasions." The trial court imposed full strength consecutive sentences for appellant's convictions of forcible sexual penetration, forcible rape and forcible oral copulation, concluding the crimes had been committed on separate occasions within the meaning of section 667.6, subdivision (d). Appellant argues that because the prosecution did not assign a particular date for any of the offenses, and because the jury did not determine whether the offenses occurred on separate occasions, the mandatory consecutive sentencing provisions of section 667.6, subdivision (d), do not apply. We disagree.[6]

Forcible sexual penetration, forcible rape and forcible oral copulation are all offenses governed by section 667.6, subdivision (d). (§ 667.6, subd. (e)(1), (7) & (8).) The trial court, rather than the jury, may determine whether such offenses were committed on separate occasions when that issue is not established by the verdict in the case. (*People v. Wilson* (2008) 44 Cal.4th 758, 813 [Sixth Amendment does not require jury finding to impose mandatory consecutive sentences under § 667.6, subd. (d)].)

"In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the

[6] Although we are remanding the case for a fitness hearing to determine whether appellant's case should be handled in the juvenile court, we consider this issue on the merits in the event the judgment is ultimately reinstated.

issue of whether the crimes in question occurred on separate occasions." (§ 667.6, subd. (d).) "Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.)

Appellant was convicted of five counts of forcible sexual penetration, one count of forcible rape, and one count of forcible oral copulation. Neither Jane Doe nor appellant recalled specific dates in their statements to the police and the information alleged each offense was committed "[o]n or about October 2011 through May 29, 2012." The verdict forms similarly stated a date range of "October 2011 through May 29, 2012." It was clear from the evidence, however, that none of the forcible sexual offenses were committed during the same incident, much less during the same "occasion" for purposes of section 667.6, subdivision (d).

In his *Mirandized* statement to Officer Keefe, appellant said the sexual contact with Jane Doe began during an incident where they were wrestling and he accidentally touched her. At some point after that he "forced [himself] on her to have — to have sex with her," but before that he had put his finger inside her vagina "maybe like five" times. Appellant described the first time he had intercourse with Jane in some detail. He thought she knew what was going to happen because he had "put [his] fingers in her before," but he denied putting his fingers inside Jane or orally copulating her on that occasion. He did, however, orally copulate her on other occasions, "like five" times, later revised to an estimate of "two or three times" "maybe like towards the end when I like started to stop." Prior to the first time they had intercourse, appellant had never "put his mouth on her."

Appellant told Officer Keefe that after they had intercourse for the first time, he continued to force Jane to have intercourse "maybe like once every other week or something." In each of these incidents appellant would have Jane lie down on the bed, would struggle to remove her underwear, and would lie on top of her. Appellant never

used his mouth on Jane and then put his penis inside her afterward. The most recent sexual assault against Jane was an incident in her bedroom a few months prior to the interview, during which she took her clothes off at appellant's direction and he put his fingers inside her vagina "one [or] two times." He did not take his own clothes off and "that was like the end of it."

Jane similarly recounted that appellant had penetrated her with his finger "several times" before the first act of intercourse. She described the first act of intercourse, but at some point would start blacking out when appellant raped her so she could not estimate how many times he committed similar acts. After appellant deleted the video he had used to blackmail her, the intercourse stopped and appellant would put his mouth on her vagina instead.

Based on the evidence, the trial court could have reasonably found the five counts of forcible sexual penetration were based on five completely separate incidents preceding the first act of intercourse, and the act of oral copulation was committed at a later date. There is no suggestion any of the acts of sexual penetration were themselves committed on the same day except for the final sexual assault in which appellant placed his finger inside Jane's vagina "one [or] two times." Appellant was also clear he did not penetrate Jane with his fingers or orally copulate her when he forced her to have intercourse on the specific occasion he described. The court did not err in concluding the crimes were committed on separate occasions making consecutive sentences mandatory under section 667.6, subdivision (d).

DISPOSITION

The judgment is conditionally reversed. The case is remanded to the juvenile court with directions to conduct a fitness hearing under Welfare and Institutions Code section 707, subdivision (a), no later than 90 days from the filing of the remittitur. If, at the fitness hearing, the court determines it would have transferred appellant to a court of criminal jurisdiction because he is "not a fit and proper subject to be dealt with under the juvenile court law" (Welf. & Inst. Code, 707.1, subd. (a)), then the judgment shall be reinstated. If, at the fitness hearing, the court finds it would not have transferred the case

to a court of criminal jurisdiction, it shall treat appellant's convictions as juvenile adjudications and shall impose an appropriate disposition under juvenile law.

NEEDHAM, J.

I concur.

SIMONS, ACTING P.J.

(A144718)

BRUINIERS, J., Concurring and dissenting.

I agree with my colleagues in all respects save one. I continue to disagree that the Public Safety and Rehabilitation Act of 2016 (Proposition 57) is to be given retroactive effect in circumstances such as here, and I would affirm the judgment unconditionally.

Proposition 57, which became effective November 9, 2016, eliminated the People's ability to directly file criminal charges against a minor in an adult court. The majority acknowledges that Proposition 57 is silent as to the initiative's retroactive application. The presumption, therefore, is that it is not retroactive. (Pen. Code, § 3 [no part of the Penal Code is retroactive "unless expressly so declared"]; *People v. Brown* (2012) 54 Cal.4th 314, 319 [the default rule of Pen. Code, § 3 codifies " 'the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application' "]; *In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*) ["when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively"].) " ' "[A] statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective." ' " (*Brown*, at p. 320.)[1]

The majority would apply, however, the ameliorative rule of *Estrada*, providing for retroactive application of a statutory amendment reducing punishment for an act committed before the amendment, but for which a defendant was sentenced after the amendment. In *Estrada*, the Supreme Court held that, notwithstanding Penal Code section 3, "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an

[1] In interpreting a voter initiative, we apply the same principles that govern statutory construction. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593.)

inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) "*Estrada*, which creates a presumption of retroactivity in apparent contradiction to the default rule [of Penal Code section 3], has been confined by subsequent decisions to its ' "specific context." ' " (*People v. Davis* (2016) 246 Cal.App.4th 127, 135, review granted July 13. 2016, S234324; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1196, disapproved on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Two other appellate courts, in published opinions, have applied Proposition 57 retroactively, relying upon the rationale of *Estrada*. In *People v. Vela* (2017) 11 Cal.App.5th 68, review granted July 12, 2017, S242298, Division Three of the Fourth District held that the electorate intended the benefits of Proposition 57 to apply to every minor to whom it may constitutionally apply, including the defendant whose conviction was on appeal. (*Id*. at p. 81; see *id*. at p. 71.) The *Vela* court conditionally reversed and ordered a remand for the juvenile court to conduct a juvenile transfer hearing under Welfare and Institutions Code section 707, the remedy the majority proposes here. (*Vela*, at pp. 82–83.) More recently, a majority in Division Five of the Second District adopted *Vela*'s rationale in reaching a similar result. (*People v. Pineda* (Aug. 14, 2017, B267885) ___ Cal.App.5th ___ (*Pineda*) [2017 Cal.App.Lexis 706].) My colleagues in the majority also find the reasoning of *Vela* persuasive. I do not.

Every other court to examine the issue so far in a published opinion has reached a contrary conclusion. (*People v. Superior Court* (*Walker*) (2017) 12 Cal.App.5th 687; *People v. Marquez* (2017) 11 Cal.App.5th 816, review granted July 26, 2017, S242660; *People v. Mendoza* (2017) 10 Cal.App.5th 327, review granted July 12, 2017, S241647; *People v. Superior Court* (*Lara*) (2017) 9 Cal.App.5th 753, review granted May 17,

2017, S241231; *People v. Cervantes* (2017) 9 Cal.App.5th 569, review granted May 17, 2017, S241323.) Our Supreme Court has already granted review in these matters (except *Walker*[2] and *Pineda*) to address this issue and will ultimately provide a definitive answer to the question. Like my colleagues, I see no need to expand on the reasoning of prior published cases. I join *Walker*, *Marquez*, *Mendoza*, *Lara*, and *Cervantes* (and the dissent in *Pineda*) in concluding Proposition 57 has no retroactive application postconviction, at least in the absence of a reversal and retrial. I therefore disagree that the trial court is required to determine if Pitcher would have been suitable for juvenile court treatment.

I concur in part and dissent in part.

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BRUINIERS, J.

[2] A petition for Supreme Court review was filed on July 11, 2017.